UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JIN ZHU, Plaintiff, -vs- WATERVILLE SCHOOL DISTRICT NO. 209, and RAYMOND REID, Defendants.	NO. CV-10-0333-LRS ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT IN PART; AND RESETTING TRIAL DATE

BEFORE THE COURT is Defendants' Motion for Summary Judgment (ECF No. 19), filed November 1, 2011; and Plaintiff's Motion for Partial Summary Judgment, ECF No. 24, also filed on November 1, 2011. A telephonic hearing was held on January 19, 2012. James Baker appeared on behalf of Defendants Raymond Reid and Waterville School District No. 209 ("school district"). Steven Lacy appeared on behalf Plaintiff Jin Zhu. This order is entered to supplement the record and confirm the preliminary oral ruling of the Court rendered at the conclusion of the oral argument on January 19, 2012. The Court, having considered the argument of counsel, enters this Order.

I. BRIEF BACKGROUND

Defendants Waterville School District and Raymond Reid have both moved for summary judgment dismissal in this case, claiming that

plaintiff Zhu cannot present sufficient evidence to support his various causes of action. Zhu asserts causes of action against the school district for both disparate treatment and hostile environment race discrimination and retaliation in violation of 42 U.S.C. §2000e-2, as well as retaliation for opposing race discrimination in violation of 42 U.S.C §2000e-3. He also asserts a claim against the school district for violation of his civil rights under 42 U.S.C. §1983. In addition, Zhu asserts claims against Raymond Reid, the district's superintendent, for retaliation in violation of 42U.S.C. §2000e-3 and for violation of his civil rights under 42 U.S.C. §1983. Zhu also asserts claim for punitive damages against defendant Reid. Defendants seek dismissal of all of plaintiff's claims against both defendants.

II. SUMMARY JUDGMENT STANDARD

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir.), cert. denied, 423 U.S. 1025 (1975). Under Rule 56 of the Federal Rules of Civil Procedure, a party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 (1986); *Semegen v. Weidner*, 780 F.2d 727 (9th Cir. 1985). Summary judgment is precluded if there exists a genuine dispute over a fact that might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248.

The moving party has the initial burden to prove that no genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Once the moving party has carried

its burden under Rule 56, "its opponent must do more than simply show that there are some metaphysical doubt as the material facts." Id. The party opposing summary judgment must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In ruling on a motion for summary judgment, all inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. *Matsushita*, 475 U.S. at 587. Nonetheless, summary judgment is required against a party who fails to make a showing sufficient to establish an essential element of a claim, even if there are genuine disputes regarding other elements of the claim. *Celotex*, 477 U.S. at 322-23.

III. DISCUSSION

A. Plaintiff's Motion for Partial Summary Judgment

The defendant school district attempted to discharge the plaintiff by issuing a notice of probable cause for his discharge from which the plaintiff timely appealed. At the contested hearing on that discharge a statutory hearing officer took evidence on the issue of whether the plaintiff had engaged in nonremediable misconduct, whether the district had met its remediation obligation to the plaintiff, and whether there was probable cause to support the district's purported discharge of the plaintiff. The hearing officer then entered findings of fact, conclusions of law, and a judgment adverse to the school district on all those issues. Plaintiff argues that collateral estoppel bars litigation of an issue in a later proceeding involving the same parties. *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn.App. 304, 237 P.3d

316 (Div. III, 2010).

In this case, plaintiff and the school district did previously litigate the issue of whether the school district properly remediated any alleged remedial conduct by Zhu and whether the district had probable cause to discharge Zhu. Both issues were decided against the district in a judgment on the merits by the hearing officer. The hearing officer also received evidence and made factual findings regarding Zhu's filings of grievances based on his allegation that he was being victimized due to his race and national origin.

Defendants argue that the application of collateral estoppel is not applicable to the case at bar and the issue decided in the earlier proceeding was not identical to the issue presented in this later proceeding.

The party seeking to avoid litigation on an issue based on collateral estoppel must show that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn. 2d 299, 307, 96 P.3d 957 (2004).

The Court finds that plaintiff Zhu should not have to relitigate the question of whether the school district failed to meet its remediation obligation or the question of whether the school district had probable cause to terminate his employment. As to these issues only, plaintiff's

partial summary judgment is granted. As to all other issues, said motion is hereby denied.

B. Defendants' Motion for Summary Judgment

1. Disparate Treatment-Race Discrimination Under Title VII

A plaintiff must first establish a prima facie case for this claim by presenting evidence that (1) he belongs to a protected class of persons, (2) he performed his job satisfactorily, (3) he suffered adverse employment action, and (4) he was treated differently than other similarly situated individuals not belonging to his protected class. *Cornwell v. Electra Central Credit Union, et. al.,* 439 F.3d 1018, 1028 (9th Cir. 2006). Although defendants do not dispute that plaintiff is in a protected class, they argue that Zhu did not suffer any adverse action as he was successful in his administrative hearing and Zhu was treated the same as all teachers at Waterville schools.

The Court finds that plaintiff can arguably establish a prima facie case based upon the evidence presently before the Court, although there exists questions of fact as to whether Zhu was treated the same as all teachers similarly situated. Defendants must also offer a legitimate, non-discriminatory reason(s) for the alleged adverse employment action. As noted above, this Court is bound by the hearing officer's finding that the school district did not have probable cause to discharge Zhu. While this ruling against the district does not by itself preclude summary judgment, when viewed against the two (2) year period during which unresolved racial issues continued to surface, summary judgment in favor of the district must be denied. Therefore, plaintiff is entitled to a trial on his claim of disparate treatment-race discrimination, as genuine

issues of material fact exist.

2. Hostile Environment--Race Discrimination[1]

To survive summary judgment, Zhu must show that

(1) Defendant school district subjected him to verbal or physical conduct of a racial nature,
(2) that was unwelcome, and
(3) "sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive work environment."

Vasquez v. County of Los Angeles, 349 F.3d 634, 642 (9th Cir. 2004); *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985)). Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law. *Id.*

The standard in the Ninth Circuit is that the working environment must be both subjectively and objectively abusive, and must be determined from the perspective of a reasonable person with the same fundamental characteristics of the plaintiff. *Ellison v. Bundy*, 924 F.2d 872, 879 (9th Cir. 1991); *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995).

Plaintiff argues that conduct of third parties in the workplace, in this case students, can be imputed to an employer (the school district). *See Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985)(holding that the imputation rules developed for hostile environment sexual harassment applies to work environment racial discrimination as well). Plaintiff complains that the school district never acted to remedy the allegedly racially hostile work environment

[1]This claim is raised against defendant school district only.

described to them by Zhu[2] at any time before deciding to exclude Zhu from the workplace and investigate him in August, 2009. Defendants argue the racially hostile environment to which Zhu was subjected was not sufficiently "severe" or "pervasive."

To determine whether conduct was sufficiently severe or pervasive to violate federal law, the court must consider "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* (*quoting Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001)). The conduct at issue must be perceived as abusive, both subjectively from Zhu's perspective and objectively, from the perspective of a reasonable Chinese-American. *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1115 (9th Cir. 2002).

Plaintiff has submitted sufficient evidence to submit to a jury the question of whether his environment, perceived as hostile, was motivated, by race. The Court concludes that a jury could objectively conclude that an objective person of Zhu's constitution may have considered the degree of alleged racism he was facing to be severe. This, however, is a question for the fact-finder.

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[2]Zhu described being called a chink, a communist, and gay by his students; in 2008 Zhu was the subject of a cartoon that depicted a border patrol shooting someone described as a communist chink; and in May, 2009 a student scrawled a hateful racial attack against Zhu on a bathroom wall, saying he hoped Zhu's new house would burn down.

3. Retaliation[3]

42 U.S.C. §2000e-3(a) generally prohibits an employer's retaliation against an employee for opposing a reasonably perceived violation of §2000e- 2(a)(1). To prove his claim, Zhu must show that (1) he engaged in protected activity, (2) he suffered an adverse employment action and, (3) there was a causal link between the protected activity and the adverse action taken against him. *Davis v. Team Electric Co.*, 520 F. 3d 1080, 1093-94 (9th Cir. 2008). Plaintiff asserts that he engaged in protected activity (filed grievances). Plaintiff further asserts that under both Ninth Circuit and Washington case law, he suffered an adverse employment action. ECF No. 42, at 5-6. As to the causal link between Zhu's opposition to perceived race discrimination at Waterville and his placement on administrative leave, Plaintiff points out the proximity of the decision to place him on leave to his grievance activity in the spring and summer of 2009. Plaintiff argues the evidence shows a pattern of retaliatory conduct by the administration, including the attempt by his principal to put him on an undeserved improvement plan, the deceptive actions of his superintendent to prevent him from voicing his complaints to the school board, the use of administrative leave to attempt to build a case against Zhu which did not exist at the time, and the administrative attempt to discharge Zhu by notice given to Zhu on September 2, 2010.

Defendants challenge the causal link element and also state that

[3]This claim is against both defendant school district and defendant Reid. Plaintiff's theory for raising this claim against Superintendent Reid is that he was the individual who actually made the decision to subject Zhu to the alleged adverse employment action (the unwarranted administrative leave and the eventual discharge process).

Zhu's grievances were mostly about Collective Bargaining Act violations rather than racial complaints. Defendants also argue that Zhu failed to exhaust his administrative remedies sufficiently to entitle him to maintain his retaliation claim in relation to his filing of a EEOC charge of discrimination on June 7, 2010.[4]

The Court finds, based on the arguments of the parties, this claim is necessarily predicated on Zhu's claim of race discrimination. Because a question of fact remains as to whether Zhu suffered race discrimination, this claim also survives the motion for summary dismissal.

4. 42 U.S.C. §1983 Procedural Due Process Constitutional Violation

Plaintiff's complaint states that Zhu was constructively discharged by defendant school district without procedural due process of law. Zhu's complaint, however, was filed before the administrative hearing decision was rendered.

Defendants argue plaintiff Zhu was not "constructively discharged." Defendants further state plaintiff was not deprived of his property right to public employment. Plaintiff was provided with a notice of probable cause for discharge. Plaintiff was then afforded all of the procedural due process rights set forth in RCW Ch. 28A.405. Defendant school district also has withdraw its Eleventh Amendment Immunity defense.

To establish such a 42 U.S.C. §1983 civil rights claim based on procedural due process, a plaintiff must show that two elements exist:

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[4]That EEOC charge alleged both discrimination and retaliation from September 25, 2007 until the date of its filing. Plaintiff Zhu was provided a Right to Sue letter on July 9, 2010 without any EEOC investigation; defendant Reid issued the Notice of Probable Cause for Discharge on September 2, 2010.

deprivation of a constitutionally protected liberty or property interest and denial of adequate procedural protection. *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir.1998). In *Paul v. Davis*, the Supreme Court held that "reputation alone, apart from some more tangible interests," does not constitute "'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." 424 U.S. 693, 693, 701, 709-10, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

In determining whether the school district's procedure comported with due process, the court must consider the three factors formulated in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976): the private interest affected by the official action; the risk of an erroneous deprivation of the private interest through the procedures used; and the governmental interest involved.

When a public employee is terminated for cause, he is entitled to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). An employee is only entitled to a "very limited hearing prior to his termination", *Gilbert v. Homar*, 520 U.S. 924, 929, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997), which "need not be elaborate." *Loudermill*, 470 U.S. at 545, 105 S.Ct. 1487.

Plaintiff suggests that the reasons given to him in the notice of probable cause for discharge were false and/or pretextual. Defendants argue, however, that Zhu had engaged in a variety of acts of misconduct and that he had been informed of the problems voiced by students,

parents, and administration and had ample opportunity to address the accusations before his administrative hearing. Defendants further point out that Zhu was successful in his administrative hearing and retained his teaching position.

Although the Court finds this claim to be more problematic for plaintiff based on the full administrative hearing afforded plaintiff, this claim is based on factually-driven questions and is not proper for summary judgment. The Court also denies summary judgment on this claim considering the rulings on the other distinct, but related claims above.

C. Conclusion

The Ninth Circuit has held that "very little[ ] evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive ... may suffice to raise a question that can only be resolved by a fact-finder." *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1409 (9th Cir. 1996). "When [the] evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption,[5] a factual question will almost always exist with respect to any claim of a nondiscriminatory reason." *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1111 (9th 1991); *see also Lam v. University of Hawaii*, 40 F.3d 1551, 1564 (9th Cir. 1994).

The 9th Circuit has held: "Employment discrimination cases

[5]The pretext method, which was established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), requires the plaintiff to initially establish a prima facie case of unlawful discrimination. If the plaintiff establishes a prima facie case, a rebuttable presumption that the employer unlawfully discriminated against is created. The burden of production then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision.

inevitably present difficult problems of proof, because we cannot peer into the minds of decisionmakers to determine their true motivations." *Coghlan v. American Seafoods Co.*, 413 F.3d 1090, 1100 (9th Cir. 2005). However, such uncertainty at the summary judgment stage must be resolved in favor of the plaintiff. *Sischo-Nownejad*, 934 F.2d at 1111 ("We require very little evidence to survive summary judgment precisely because the ultimate question is one that can only be resolved through a 'searching inquiry'--one that is most appropriately conducted by the fact finder, upon a full record.").

IT IS ORDERED that:

1. Defendants' Motion for Summary Judgment, **ECF No. 19**, is **DENIED**.

2. Plaintiff's Motion for Partial Summary Judgment, **ECF No. 24**, is **GRANTED in part**, and **DENIED in part** as discussed above.

3. The new trial date is SET for **April 16, 2012 at 9:00 a.m.** in Yakima, Washington, due to Court's calendar conflicts. The trial date of March 5, 2012 is **VACATED.**

IT IS SO ORDERED.

The District Court Executive is directed to file this Order and provide copies to counsel.

DATED this 25th day of January, 2012.

s/Lonny R. Suko

LONNY R. SUKO
UNITED STATES DISTRICT JUDGE